

***United States Court of Appeals
for the Second Circuit***



**SUPPLEMENTAL
BRIEF**

76-1356

To be argued by
SHEILA GINSBERG

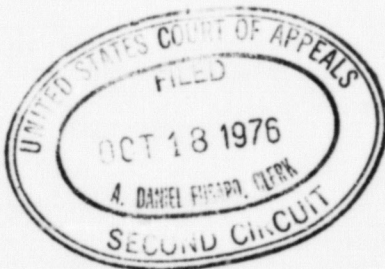
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :
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Plaintiff-Appellee, :
:
-against- :
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MARIO CAICEDO, :
:
Defendant-Appellant. :
:
-----X

Bp/s
Docket No. 76-1356

SUPPLEMENTARY BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MARIO CAICEDO
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel.

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Plaintiff-Appellee,

-against-

MARIO CAICEDO,

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APPELLANT CAICEDO'S CONVICTION
UNDER COUNT ONE MERGES WITH HIS
CONVICTION UNDER COUNT TWO.

Counts One and Two of the indictment were based on a single transaction involving the alleged sale of one-eighth kilogram of cocaine on April 30, 1974. Count One charged that Caicedo possessed the cocaine with intent to distribute it, in violation of 21 U.S.C. §841(a)(1). Count Two charged that he actually distributed the same cocaine on the same

day, in violation of the same statutory provision.

It is established law that where the gravamen of two offenses is identical, the convictions of the defendant for those offenses merge. See, e.g., Prince v. United States, 352 U.S. 322, 329 (1957). As to the crime charged in Count Two of the instant proceeding,

[t]he gravamen of each offense is the distribution of a controlled substance. When the intent is carried out by a successful sale, the offenses merge.

United States v. Curry, 512 F.2d 1299, 1306 (4th Cir. 1974).*

See also United States v. Stevens, 521 F.2d 334, 336-337 (6th Cir. 1975); United States v. Atkinson, 512 F.2d 1235 (4th Cir. 1975); cf. United States v. Howard, 507 F.2d 559, 563 (8th Cir. 1974) (merger of "possession" and "possession with intent to distribute" counts based on a single transaction).** Appel-

*In United States v. Curry, *supra*, as in the present proceeding, the appellant had been convicted of one count of "possession with intent to distribute" a controlled substance and one count of "distribution" of a controlled substance, based on a single transaction.

**The Fifth Circuit, stating that it follows the "different evidence" test, has ruled that these crimes do not merge because it is theoretically possible to possess without distributing or to distribute without possessing a controlled substance. United States v. Horsley, 519 F.2d 264 (5th Cir. 1975). The "different evidence" test, however, is appropriate to double jeopardy rather than to merger questions. See, e.g., Morgan v. Devine, 237 U.S. 632 (1915). Indeed, the Fifth Circuit's application of the "different evidence" test conflicts with Prince v. United States, *supra*, 352 U.S. 322, since it is theoretically possible to enter a bank without robbing it or to rob a bank without entering it.

lant's conviction on Count One therefore merged with his conviction on Count Two. Consequently, the judgment of conviction and sentence on Count Two must be vacated and the case remanded for resentencing.

Although the sentence imposed on Count One was concurrent with the sentence imposed on Count Two, the sentence on the merged count must be set aside because of its potential impact on the defendant's parole eligibility. United States v. Stevens, *supra*; Clermont v. United States, 432 F.2d 1215, 1217 (9th Cir. 1970); see also United States v. Gaddis, ___ U.S. ___, 44 U.S.L.W. 4293, 4394 n.12 (March 3, 1976); United States v. Mariani, Docket No. 76-1075, slip op. 5045, 5046-5047 (2d Cir., July 19, 1976). Similarly, the conviction on the merged count must be vacated because of the detrimental collateral consequences of any improper felony conviction. Marshall v. United States, 436 F.2d 155, 161 (D.C. Cir. 1970); see also United States v. Maze, 414 U.S. 395, 397 n.1 (1974); Benton v. Maryland, 395 U.S. 784 (1969); *cf.* United States v. Morgan, 346 U.S. 502, 505 (1954); Carafas v. LaVallee, 391 U.S. 234, 237-238 (1968); Fiswick v. United States, 329 U.S. 211, 222 (1946); United States v. Travers, 514 F.2d 1171, 1172 (2d Cir. 1974).

Finally, the concurrent sentence on the remaining count should be set aside and the case remanded for resentencing because of the possibility, in cases of merger, that conviction on the merged count improperly affected the sentence

imposed on the remaining count. See, e.g., United States v. Spears, 449 F.2d 946 (D.C. Cir. 1971); United States v. Parker, 442 F.2d 779, 780 (D.C. Cir. 1971); Marshall v. United States, supra; Coleman v. United States, 420 F.2d 616 (D.C. Cir. 1969); United States v. Parson, 452 F.2d 1007 (9th Cir. 1971).*

*As this Court held in United States ex rel. Weems v. Follette, 414 F.2d 417, 419 (2d Cir. 1969), the Supreme Court's decision in Benton v. Maryland, supra, took much of the strength out of the concurrent sentence doctrine. In the aftermath of Benton, this Court has demonstrated a marked reluctance to apply the concurrent sentence doctrine. United States v. Mapp, 476 F.2d 67, 82 (2d Cir. 1973); United States v. Brown, 479 F.2d 1170, 1173, 1176 (2d Cir. 1973); United States v. Rivera, 521 F.2d 125, 129 (2d Cir. 1975); Seiller v. United States, Doc. No. 75-2002, slip op. 6509 (2d Cir., December 1, 1975); see also the judgment of this Court in United States v. Brown, Docket No. 75-1307 (2d Cir., November 21, 1975).

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for appellant, the judgment of conviction and sentence on Count One should be vacated, the sentence on the remaining count set aside, and the case remanded for resentencing.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MARIO CAICEDO
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

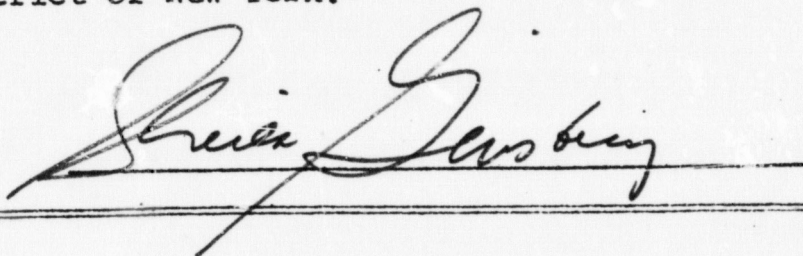
SHEILA GINSBERG,
Of Counsel.

CERTIFICATE OF SERVICE

Oct 15, 1976

supplementary

I certify that a copy of this brief [REDACTED]
has been mailed to the United States Attorney for the
Eastern District of New York.

A handwritten signature in cursive script, reading "Steven Gersberg", is written over a horizontal line.